STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 23, 2006
v	No. 257148 Wayne Circuit Court
LARRY ONELL JONES, Defendant-Appellant.	LC No. 04-002778-01

Before: Cooper, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of second-degree murder, MCL 750.317, assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with first-degree murder, MCL 750.316, assault with intent to murder, MCL 750.83, and felony-firearm. The charges stemmed from a shooting outside a liquor store. Complainants Gregory Bryant (deceased) and Courtney Toodle arrived at the store and parked next to a minivan. Defendant's girlfriend was in the minivan, and started a conversation with Toodle. Defendant told Toodle to get away from the van. Defendant and Bryant became involved in a brief verbal and physical altercation. Defendant and Hamilton left the store, but returned shortly thereafter. Defendant allegedly fired approximately ten bullets into complainants' car. Bryant died from multiple gunshot wounds, and Toodle sustained wounds to the hip and leg.

On appeal, defendant argues that the trial court improperly considered the offense of assault with intent to do great bodily harm less than murder because it is a cognate offense to the charged offense of assault with intent to commit murder. Under MCL 768.32(1), the trial court may instruct only on necessarily included lesser offense and not on cognate lesser offenses.[1]

[1] A cognate lesser offense is one that shares several elements and is of the same "class or category" as the greater offense, but contains some elements not found in the greater offense. *People v Brown*, 267 Mich App 141, 146 n 1; 703 NW2d 230 (2005) (citations omitted).

People v Cornell, 466 Mich 335, 354-357; 646 NW2d 127 (2002). Defendant asserts that the trial court, sitting as the factfinder, was not free to find him guilty of this lesser offense. MCL 763.4. We disagree.

The *Cornell* Court noted that an offense is "inferior" pursuant to MCL 768.32(1) only if "'all the elements of the lesser offense have already been alleged by charging the defendant with the greater offense.'" *Cornell, supra* at 354-355, quoting *People v Torres (On Remand)*, 222 Mich App 411, 419-420; 564 NW2d 149 (1997). The *Cornell* Court found that, consequently, a jury may only be instructed on necessarily included lesser offenses, when a rational view of the evidence supports the lesser charge. *Cornell, supra* at 357.

However, in *Brown, supra*, a majority of this Court held that that assault with intent to commit great bodily harm less than murder is a necessarily lesser included offense of assault with intent to murder. After discussing the specific elements for both crimes, the majority acknowledged that both offenses require a finding of specific intent, and that the offenses are distinguishable by the intent required of the actor at the time of the assault. *Id*. at 147-148. However, the majority found that the specific intent to commit great bodily harm was "completely subsumed" in the greater specific intent to kill, thus, rendering it impossible to commit the greater crime without committing the lesser. *Id*. at 150-151.

Defendant cannot show that the trial court erred in considering the lesser included offense during its deliberations. His actions evidenced an intent to commit great bodily harm as well as an intent to commit murder, and he does not argue that the lesser charge is unsupported by a rational view of the evidence.

Affirmed.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Jane E. Markey